Lembaga Kumpulan Wang Simpanan Pekerja v Agni Energie Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 21NCVC-20 OF 2011
YEOH WEE SIAM J
23 JULY 2013

Civil Procedure — Setting aside — Default judgment — Whether judgment regular — Whether defence on merits shown — Whether setting aside application made outside time-frame prescribed by O 42 r 13 of the Rules of Court 2012 — Whether good reasons shown for being out of time

The plaintiff had entered judgment in default ('JID') against the first defendant company and the second to fifth defendants as its directors for unpaid EPF contributions in respect of the company's employees for the months of April to June 2009. The instant application by the second defendant to set aside the JID and for leave to defend the claim were based on the grounds, inter alia, that the first defendant did send the plaintiff cheques for the sum claimed and that the sum claimed by the plaintiff was, in any even incorrect.

Held, dismissing the application:

(1) The court found the JID was a regular judgment and that no merits were raised by the second defendant in her proposed defence. No bona fide triable or arguable issues were raised to justify the setting aside of the JID. The second defendant's application was also filed three months after the JID was served on her, well past the 30 days allowed for the making of the application under O 42 r 13 of the Rules of Court 2012. No good reasons were given for not making the application within the stipulated time frame (see pars 30–31).

(2) The second defendant was unable to discharge her burden of proving that the sum claimed by the plaintiff had already been paid. She also failed to prove that the amount claimed by the plaintiff was incorrect (see paras 18–19).

[Bahasa Malaysia summary

Plaintif telah memasukkan penghakiman ingkar ('PI') terhadap syarikat defendan pertama dan kedua hingga defendan kelima sebagai pengarah bagi caruman KWSP yang tidak dibayar bagi pekerja-pekerja syarikat untuk bulan April hingga Jun 2009. Defendan kedua membuat permohonan untuk mengetepikan PI dan kebenaran membela tuntutan itu berdasarkan alasan,

antara lain, bahawa defendan pertama telah menyerahkan cek plaintif untuk jumlah yang dituntut dan bahawa jumlah yang dituntut oleh plaintif adalah, dalam apa-apa adalah tidak betul.

Diputuskan, menolak permohonan:

(1) Mahkamah mendapati PI adalah suatu penghakiman yang tetap dan bahawa tiada merit telah dibangkitkan oleh defendan kedua dalam pembelaan cadangannya. Tiada bona fide isu yang boleh dibicarakan atau diperdebatkan telah dibangkitkan untuk mewajarkan pengetepian PI. Permohonan defendan kedua telah juga difailkan tiga bulan selepas PI disampaikan kepadanya, 30 hari yang dibenarkan untuk membuat permohonan di bawah A 42 k 13 Kaedah-Kaedah Mahkamah 2012 berlalu begitu sahaja. Tiada alasan yang munasabah telah diberikan untuk tidak membuat permohonan itu dalam jangka masa yang ditetapkan (lihat perenggan 30–31).

(2) Defendan kedua tidak dapat melepaskan beban pembuktikan bahawa jumlah wang yang dituntut oleh plaintif telah pun dibayar. Beliau juga gagal membuktikan bahawa jumlah yang dituntut oleh plaintif adalah tidak betul (lihat perenggan 18–19).]

Notes

For cases on default judgment, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7544–7545.

Cases referred to

Fira Development Sdn Bhd v Goidwin Sdn Bhd [1989] 1 MLJ 40, SC (refd)
Lim Koon Chow v Ambank (M) Bhd [2012] 8 MLJ 285; [2012] 4 CLJ 645, HC (refd)
Majlis Amanah Rakyat v Ismail bin Maskor & Ors [2006] 3 MLJ 281, HC (refd)
Pengkalen Concrete Sdn Bhd v Chow Mooi (Guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor [2003] 3 MLJ 67, HC (refd)

Legislation referred to

Bankruptcy Act 1967 s 3(2)(ii)
Employment Act 1955
Employee Provident Fund Act 1991 ss 2, 45, 46
Rules of Court 2012 O 42 r 13

Revathy Veerayah (Shukor Baljit & Partners) for the plaintiff.
Hanif Idris (YL Chan with him) (Dennis Nik & Wong) for the second defendant.

Yeoh Wee Siam J:

[1] This is the second defendant's application for the following orders:

1A. Kebenaran kepada Defendan Kedua untuk memfailkan permohonan ini di luar masa.

1. Penghakiman Ingkar oleh Mahkamah bertarikh 17 Mac 2011 yang diperolehi oleh Plaintif terhadap Defendan atas alasan bahawa Defendan-Defendan telah gagal untuk memasukkan kehadiran bagi tindakan ini diketepikan di bawah Aturan 13 Kaedah 8 dibaca bersama Aturan 42 Kaedah 13 Kaedah-Kaedah Mahkamah 2012;
2. Segala prosiding perbicaraan berkenaan Penghakiman Ingkar tersebut digantung;
3. Selanjutnya sekiranya Mahkamah yang Mulia membenarkan permohonan pada perenggan 1 di atas, kebenaran diberikan kepada pihak Defendan untuk memfailkan Memorandum Kehadiran dan Pernyataan Pembelaan bagi tindakan ini;
4. Kos ditanggung oleh pihak Plaintif untuk ditaksirkan dan dibayar kepada Defendan dengan serta merta;
5. Perintah dan/atau relif lain yang diputuskan adil dan suai manfaat oleh Mahkamah yang Mulia ini.

BRIEF FACTS

[2] The plaintiff alleged that the first defendant had failed to settle contributions to the Employees Provident Fund ('EPF') due for the months of April 2009 to June 2009.

[3] The plaintiff commenced this suit (see writ of summons and statement of claim in encl 1) against the first defendant and all its directors, including the second defendant, for the recovery of the purported arrears.

[4] On 17 March 2011, the plaintiff entered judgment in default ('JID') against all the defendants for the sum of RM269,707 ('the judgment sum'). Hence, the filing of encl 7 (see exh AP–1 of the second defendant's affidavit in support in encl 8).

THE COURT'S DECISION GIVEN ON 11 July 2013 REGARDING ENCLOSURE 7

[5] The second defendant's application is dismissed. Costs of RM2,500 are

to be paid by the second defendant to the plaintiff forthwith.

GROUNDS OF DECISION

Service of cause papers and JID are regular

[6] The court finds that service of the writ of summons and statement of claim by the plaintiff on 28 January 2011 by AR registered post at the first defendant's registered address and/or business address, and on all the other defendants, including the second defendant, at their respective registered address is regular (see affidavit of service in encl 3).

[7] The plaintiff had filed the respective certificates of non-appearance against the defendants (see 'Perakuan Ketakhadiran' in encl 5).

[8] On 17 March 2011, after hearing submissions from counsel for the plaintiff, the learned judicial commissioner was satisfied that service on the defendants was duly effected. JID was given against all the defendants, with dividends and interests and costs as prayed.

[9] The JID is therefore a regular judgment.

Applicable legal principles

[10] In order to apply to set aside a regular judgment, the second defendant must show that he has a defence on the merits, otherwise there may be no point in setting it aside (see *Halsbury's Laws of Malaysia,* Vol 1, 2002 Reissue at p 604).

[11] A defence on the merits means merely raising only an arguable or triable issue (see *Mallals' Supreme Court Practice,* (2nd Ed), Vol 1 at p 84, and *Fira Development Sdn Bhd v Goidwin Sdn Bhd* [1989] 1 MLJ 40 (SC)).

[12] To show a defence with merits, a draft defence must also be filed (see *Pengkalen Concrete Sdn Bhd v Chow Mooi (Guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor* [2003] 3 MLJ 67 at p 74 and *Majlis Amanah Rakyat v Ismail bin Maskor & Ors* [2006] 3 MLJ 281 at p 287). This was duly complied with by the second defendant.

No merits to the defence

[13] The second defendant contended that the judgment sum is inaccurate as payments were made since 2009.

[14] Upon demand by the plaintiff vide a letter dated 19 May 2009, the first defendant wrote to the plaintiff to explain that on 28 May 2009 cheques were forwarded to the plaintiff totaling RM168,555.47. The first defendant expressed surprise as to why the plaintiff was claiming that there were contributions remaining in arrears (exhs AP3 and AP4 of encl 8). The plaintiff never replied the first defendant's letter.

[15] Further, the cheques were issued before the receiver and manager ('R and M') of the first defendant was appointed ie before July 2009.

[16] According to the second defendant, the plaintiff alleged that the first defendant had issued the cheques under the wrong name ie 'KWSP', instead of 'Kumpulan Wang Simpanan Pekerja'. The second defendant has documentary evidence to support that cheques which were previously made in favour of KWSP were cleared (exh AP10 of encl 11).

[17] The second defendant contended that the plaintiff delayed in presenting the first defendant's cheques. Delay in presentation would mean that the cheques might not have been cleared as the R and M had frozen all bank accounts when they took over the first defendant, which is not within the control of the directors of the first defendant (exh AP5 of encl 8).

[18] Even though cheques had been issued by the first defendant to pay the outstanding EPF contributions to the plaintiff, the fact remains that, on record, until the day of the JID, there was no payment of all arrears of contributions due to the plaintiff. The second defendant was unable to discharge her burden of proving that the sums due were already paid to the plaintiff. She could not show any account statements to prove that such sums were paid. As such, the JID granted is justified.

Whether the judgment sum is wrong

[19] The second defendant further contended that the JID was entered for a wrong sum ie the said debt, if any, is higher than the amount actually owing.

[20] In the second defendant's proposed defence (exh AP8 of encl 8) at para

8, the second defendant averred that there should be no contributions to the EPF for June 2009 as the services of the employees of the first defendant were terminated in early May 2009.

[21] However, it is noted that in its letter dated 5 March 2010 (exh AP7 of encl 8), the first defendant informed the plaintiff, inter alia, that the R and M had taken the necessary steps to terminate the services of the company's remaining 46 employees on 3 August 2009 and that 'The R and M will in due course make payments to the employees in accordance with the relevant statute'.

[22] In the first defendant's letter dated 4 June 2009 (exh AP7 of encl 8), the first defendant informed the Director General of Labour, Department of Labour, Selangor, inter alia, of the following:

> The Company is writing to inform the Department of Labour that there are salaries due and owing to the retrenched personnel for the last month, which will fall due on 8 June 2009.
>
> The Company will be issuing letters of retrenchment to the affected employees and will be paying them their salary that is due, together with accrued annual leave and payment in lieu at the end of the notice period.
>
> We therefore write to notify the Department of Labour of an extension of one month to this period, for the payment of staff salaries at the end of the notice period, pursuant to s 19 of the Employment Act 1955 …

[23] All the retrenchment notices (exh AP7 of encl 8, p 47 to 183) dated 12 June 2009 issued by the first defendant to its employees terminated their respective employment with effect from 12 June 2009 and paid the respective salaries in lieu of one month notice as provided in the Employment Act 1955.

[24] It is further noted that in the letter dated 25 February 2011 (exh AP6 of encl 8), the R and M of the first defendant informed the plaintiff, inter alia, the following:

> The total outstanding EPF contributions due during the Pre-receivership Period based on the Borang E as provided to us by EPF is summarized as follows:

Wage month	Contribution Month	Employer's Contribution (RM)	Employees' Contribution (RM)	Total Contribution (RM)
March 2009	April 2009	44,322	40,527	84,849
April 2009	May 2009	49,311	44,581	93,892
May 2009	June 2009	47,812	43,154	90,966
Total	141,445	128,262	269,707	

Please note that the above amount excludes the contributions for the wage month of 1 June 2009 to 12 July 2009 (which is the period prior to the R and M's appointment) as the books and records made available to the R and M are grossly incomplete.

As we have advised, the total amount of RM138,759 currently available is only sufficient for partial payment of the total outstanding EPF contributions for the Pre-Receivership Period of RM269.707 (up to wage month ending 31 May 2009). Based on this, we have been advised by your goodself to apply the funds to settle outstanding EPF contributions based on the earliest contribution month first followed by the next earliest contribution month, etc. until the funds are fully exhausted.

Accordingly, the total amount of RM138,759 will be utilized for payment as follows:

Wage month	Contribution Month	Total Outstanding (RM)	Amound Paid (RM)	Balance Outstanding (RM)	Comments
March 2009	April 2009	84,849	84,849	-	Full payment
April 2009	May 2009	93,892	53,910	39,982	Partial payments as funds have been exhausted
May 2009	June 2009	90,966	-	90,966	No payments as funds have been exhausted
Total	269,707	138,759	130,948		

From the above documents produced by the second defendant herself, it is clear that first defendant's employees were terminated on 12 June 2013, even though for some unexplained reason, the first defendant's letter to the plaintiff in exh AP7 at p 48 informed the plaintiff that the first defendant would terminate its employees on 3 August 2009. Therefore, in June 2009, the first defendant was still the 'employer' of the employees within the meaning of such definition in s 2 of the Employee Provident Fund Act 1991 ('the EPF Act'). It is without doubt, as can be seen from the letter of the R and M (exh AP6), that the outstanding amount of EPF contributions to be paid by the first defendant is RM269,707, which is the same sum as stated in the judgment sum. If the cheques sent by the first defendant were not cashed by the plaintiff, then the first defendant, and the other defendants, including the second defendant, are still liable under s 45 of the EPF Act to pay the required EPF contributions.

[25] The burden of proof is on the second defendant to prove that there are errors in the amount of the plaintiff's claim. Section 3(2)(ii) of the Bankruptcy Act 1967 provides:

> 3 (2)A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non compliance therewith and shall be served in the prescribed manner:
>
> Provided that a bankruptcy notice —
>
> (i) …; and
>
> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due *unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake*: but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein. (Emphasis added.)

[26] The second defendant, as judgment debtor ('JD'), did not give notice to the plaintiff, as judgment creditor ('JC') in accordance with s 3(2)(ii) of the Bankruptcy Act 1967 pursuant to the Kuala Lumpur High Court Bankruptcy action No 29–220–01 of 2013 (exh AP9 of encl 8).

[27] As stated by Lee Swee Seng JC in *Lim Koon Chow v Ambank (M) Bhd* [2012] 8 MLJ 285; [2012] 4 CLJ 645:

> [61] It is not sufficient for the JD to show that his calculation of the sum owing according to the judgment obtained is different in that it is less than the sum said to owing by the JC. The JD must descend to details to show where the error has arisen. Effect must be given to s 3(2)(ii) of the BA.

In the absence of any notice being given by the second defendant to the plaintiff under s 3(2)(ii) of the Bankruptcy Act 1967, it can be safely concluded that the amounts in the judgment sum are accurate. The second defendant cannot be allowed to blow hot and cold. She cannot, on the one hand, accept the amounts in the bankruptcy notice (ie RM227,720 which is the balance of the sum due), and, on the other hand, dispute in this application the accuracy of the judgment sum.

Liability of the company and its directors is joint and several

[28] The liability of the second defendant, as a director of the first defendant company, is joint and several with that of the first defendant. This is provided in s 46 of the EPF Act as follows:

46 Joint and several liability of directors, etc.

(1) *Where any contributions remaining unpaid by a company*, a firm or an association of persons, then, notwithstanding anything to the contrary in this Act or any other written law, *the directors of such company* including any persons who were directors of such company during such period in which contributions were liable to be paid, or the partners of such firm, including any persons who were partners of such firm during such period in which contributions were liable to be paid, or the office-bearers of such association of persons, including any persons who were office-bearers of such association during such period in which contributions were liable to be paid, as the case may be, *shall together with the company, firm or association of persons liable to pay the said contributions, be jointly and severally liable for the contributions due and payable to the Fund.*

(2) *In this section the word 'contribution' shall be deemed to include any dividend and interest due on any contributions.* (Emphasis added.)

The second defendant, as a director of the first defendant, is therefore liable for the judgment sum to the plaintiff since there is no proof that such sum has been paid by the first defendant or any of the other directors of the company.

Delay in filing this application

[29] Under O 42 r 13 of the Rules of Court 2012 ('ROC'), a party intending to set aside or to vary such order or judgment *shall* make an application to the court and serve it on the party who has obtained the order or judgment within 30 days after the receipt of the order or judgment by him. (Emphasis added.)

[30] The JID was granted by the court on 17 March 2011. The second defendant contended that she was not aware of the said JID until she was served with the bankruptcy notice by the plaintiff on 3 February 2013. This application was filed on 3 May 2013 ie three months after the purported service of the JID on the second defendant, and past the 30 days allowed for making an application to set aside a judgment under O 42 r 13 of the ROC. The second defendant is clearly out of time in filing this application. No good reasons were given by the second defendant for not making the application within the time stipulated in the ROC.

Order of court

[31] Based on the foregoing considerations, the court is satisfied that there is no merit to the second defendant's proposed defence. There are no bona fide triable or arguable issues raised by the second defendant. There is therefore no justification to aside the JID. Accordingly, I dismissed the application.

Application dismissed.

Reported by Ashok Kumar